

**FINDINGS AND DETERMINATION OF THE COMMISSIONER
PURSUANT TO [IC 13-14-9-8](#) AND DRAFT RULE
LSA Document #16-217**

COAL COMBUSTION RESIDUALS**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) has developed draft rule language for amendments to [329 IAC 10-3-1](#) and [329 IAC 10-9-1](#) to incorporate by reference the federal requirements found at 40 CFR 257, Subpart D, for the operation and closure of a coal combustion residuals (CCR) impoundment. IDEM is soliciting written comment on the draft rule language and will schedule a public hearing before the Environmental Rules Board (board) for consideration of adoption of these rules.

CITATIONS AFFECTED: [329 IAC 10-3-1](#); [329 IAC 10-9-1](#).

AUTHORITY: [IC 13-14-9-8](#); [IC 13-19-3-1](#).

STATUTORY REQUIREMENTS

[IC 13-14-9-8](#) recognizes that, under certain circumstances, it may be appropriate to reduce the number of public comment periods and public hearings usually provided for under the [IC 13-14-9](#) environmental rulemaking process. In cases where the commissioner determines that there is no reasonably anticipated benefit from a second public comment period and first public hearing to either the environment or persons regulated or otherwise affected by the proposed rule, IDEM may forgo these comment periods and proceed directly to the public hearing and board meeting at which the draft rule is considered for adoption. Two opportunities for public comment (with this notice and at the public hearing prior to adoption of the rule) remain under this procedure.

If the commissioner makes the determination of no anticipated benefit required by [IC 13-14-9-8](#), the commissioner shall prepare written findings and publish those findings in the Indiana Register prior to the board meeting at which the draft rule is to be considered for adoption and include them in the board packet prepared for that meeting. This document constitutes the commissioner's written findings pursuant to [IC 13-14-9-8](#).

The statute provides for this shortened rulemaking process if the commissioner determines that:

(1) the rule constitutes:

(A) an adoption or incorporation by reference of a federal law, regulation, or rule that:

(i) is or will be applicable to Indiana; and

(ii) contains no amendments that have a substantive effect on the scope or intended application of the federal law or rule;

(B) a technical amendment with no substantive effect on an existing Indiana rule; or

(C) an amendment to an existing Indiana rule, the primary and intended purpose of which is to clarify the existing rule; and

(2) the rule is of such nature and scope that there is no reasonably anticipated benefit to the environment or the persons referred to in [IC 13-14-9-7\(a\)\(2\)](#) from:

(A) exposing the rule to diverse public comment under [IC 13-14-9-3](#) or [IC 13-14-9-4](#);

(B) affording interested or affected parties the opportunity to be heard under [IC 13-14-9-3](#) or [IC 13-14-9-4](#); and

(C) affording interested or affected parties the opportunity to develop evidence in the record collected under [IC 13-14-9-3](#) and [IC 13-14-9-4](#).

BACKGROUND

CCR are fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers. The United States Environmental Protection Agency (U.S. EPA) promulgated federal regulations found at 40 CFR 257, Subpart D, for the operation, record keeping, and closure of CCR impoundments. These regulations were published in the Federal Register on April 17, 2015 (80 FR 21302) and became effective on October 19, 2015. The regulations are self-implementing, but contain strict compliance deadlines. A CCR impoundment must meet operating criteria within six months of the effective date of the rule, or by April 19, 2016, or close within 18 months of the effective date of the rule, or by April 19, 2017. The operating criteria address the day-to-day operations of CCR impoundments and establish requirements to prevent impacts to public health and the environment. Compliance with the operating criteria must be documented in the facility's operating record, and the facility must provide the state with notifications regarding certain aspects of its compliance.

Indiana rules are limited and only regulate CCR impoundments at final closure if waste is closed in place,

under the solid waste rules found at [329 IAC 10](#). Because the federal regulations are self-implementing, there is no regulatory agency providing compliance and enforcement oversight. By incorporating these regulations by reference into Indiana law, IDEM will have the authority to ensure compliance and take enforcement action if necessary to ensure protection of human health and the environment.

Additionally, IDEM was contacted by interested stakeholders who requested that IDEM explore the possibility of approving alternatives to the compliance deadlines associated with 40 CFR 257, Subpart D. Alternate compliance schedules are allowable in accordance with 40 CFR 256, if approved by U.S. EPA as part of a state's Solid Waste Management Plan (SWMP). In order for IDEM to obtain U.S. EPA's approval of such a change to Indiana's SWMP, the current state regulations found at [329 IAC 10](#) need to be changed. Indiana must be able to show that the state can enforce standards as stringent as the federal regulations. To establish enforcement capabilities, an emergency rule, LSA Document #16-88(E), was passed by the Environmental Rules Board (ERB) on February 10, 2016, and became effective on February 12, 2016. The emergency rule incorporated the federal regulations applicable to CCR impoundments found at 40 CFR 257.50 through 40 CFR 257.106 into Indiana's rules for Solid Waste Land Disposal Facilities. The emergency rule is temporary and is only effective for 90 days from the filing date with the Indiana Register. The ERB may readopt the emergency rule to maintain it until such time as this rulemaking is completed. This rule will amend [329 IAC 10](#) to incorporate the changes made by the emergency rule into [329 IAC 10](#).

[IC 13-14-9-4](#) Identification of Restrictions and Requirements Not Imposed under Federal Law

No element of the draft rule imposes either a restriction or a requirement on persons to whom the draft rule applies that is not imposed under federal law. This draft rule imposes no restrictions or requirements because it is a direct adoption of federal requirements that are applicable to Indiana and contains no amendments that have a substantive effect on the scope or application of the federal rule.

Potential Fiscal Impact

This rule will not impose any requirements on regulated entities beyond what is imposed under federal law and regulation. This rule has the potential for savings to owners and operators of CCR impoundments subject to 40 CFR 257, Subpart D, because this rule will allow regulated entities to work with IDEM to establish a compliance plan that is both cost effective and protective of human health and the environment.

Public Participation and Work Group Information

At this time, no work group is planned for the rulemaking. If you feel that a work group or other informal discussion on the rule is appropriate, please contact Lauren Aguilar, Rules Development Branch, Office of Legal Counsel at (317) 234-8559 or (800) 451-6027 (in Indiana).

Small Business Assistance Information

IDEM established a compliance and technical assistance program (CTAP) under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program and other resources available can be found at:

www.in.gov/idem/ctap

For purposes of [IC 4-22-2-28.1](#), small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Patricia Daniel
IDEM Small Business Regulatory Coordinator
IGCN 1316
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 234-6562 or (800) 988-7901
ctap@idem.in.gov

For purposes of [IC 4-22-2-28.1](#), the Small Business Ombudsman designated by [IC 4-4-35-8](#) is:

Robert Warner
Office of Small Business and Entrepreneurship
One North Capitol, Suite 600
Indianapolis, IN 46204
(317) 232-5679
ombudsman@osbe.in.gov

Resources available to regulated entities through the small business ombudsman include the ombudsman's duties stated in [IC 4-4-35-8](#), specifically [IC 4-4-35-8\(9\)](#), investigating and attempting to resolve any matter regarding compliance by a small business with a law, rule, or policy administered by a state agency, either as a party to a proceeding or as a mediator.

The Small Business Assistance Program Ombudsman is:

Steven N. Howell
IDEM Small Business Assistance Program Ombudsman

IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 232-8587 or (800) 451-6027
snhowell@idem.in.gov

FINDINGS

The commissioner of IDEM has prepared findings regarding rulemaking that will bring Indiana law into conformity with federal requirements for the operation and closure of a CCR impoundment. These findings are prepared under [IC 13-14-9-8](#) and are as follows:

- (1) This rule is the direct adoption of federal requirements that are applicable to Indiana and it contains no amendments that have a substantive effect on the scope or intended application of the federal rule.
- (2) If Indiana wishes to obtain U.S. EPA approval of an amendment to Indiana's SWMP that would enable IDEM to issue and enforce alternate compliance schedules for CCR impoundments in accordance with 40 CFR 256, Indiana is required by federal law to adopt rules at least as stringent as 40 CFR 257, Subpart D.
- (3) This rule is a companion to the emergency rule, LSA Document #16-88(E), passed by the Environmental Rules Board on February 10, 2016.
- (4) The environment and persons regulated or otherwise affected by the proposed rule will benefit from prompt adoption of this rule, because it will allow IDEM to pursue U.S. EPA approval of an amendment to Indiana's SWMP so that IDEM can approve alternative compliance schedules for the operation and closure of CCR impoundments. This has the potential to save electric utilities and independent power producers a considerable amount of money while allowing IDEM to protect human health and the environment by providing compliance and enforcement oversight.
- (5) I have determined that, under the specific circumstances pertaining to this rule, there would be no reasonably anticipated benefit to the environment or to persons regulated or otherwise affected by the proposed rule from the first or second written comment period under [IC 13-14-9-3](#) or [IC 13-14-9-4](#), or from the first public hearing under [IC 13-14-9-5\(a\)\(1\)](#).
- (6) The draft rule is hereby incorporated into these findings.

Carol S. Comer
Commissioner
Indiana Department of Environmental Management

REQUEST FOR PUBLIC COMMENTS

This notice requests the submission of comments on the draft rule language, including suggestions for specific revisions to language to be contained in the draft rule. Comments may be submitted in one of the following ways:

- (1) By mail or common carrier to the following address:
LSA Document #16-217 Incorporation for CCR
Lauren Aguilar
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
Indiana Government Center North
100 North Senate Avenue
Indianapolis, IN 46204-2251
- (2) By facsimile to (317) 233-5970. Please confirm the timely receipt of your faxed comments by calling the Rules Development Branch at (317) 232-8922.
- (3) By electronic mail to laguilar@idem.in.gov. To confirm timely delivery of submitted comments, please request a document receipt when sending the electronic mail. **PLEASE NOTE: Electronic mail comments will NOT be considered part of the official written comment period unless they are sent to the address indicated in this notice.**
- (4) Hand delivered to the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Regardless of the delivery method used, to properly identify each comment with the rulemaking action it is intended to address, each comment document must clearly specify the LSA document number of the rulemaking.

COMMENT PERIOD DEADLINE

All comments must be postmarked, faxed, or time stamped not later than July 1, 2016. Hand-delivered comments must be delivered to the appropriate office by 4:45 p.m. on the above-listed deadline date.

Additional information regarding this action may be obtained from Lauren Aguilar, Rules Development

DRAFT RULE

SECTION 1. [329 IAC 10-3-1](#) IS AMENDED TO READ AS FOLLOWS:

[329 IAC 10-3-1](#) Exclusions; general

Authority: [IC 13-14-8-7](#); [IC 13-15-2-1](#); [IC 13-19-3-1](#)

Affected: [IC 13-14](#); [IC 13-19-3](#); [IC 13-20](#); [IC 36-9-30](#)

Sec. 1. The following solid waste management activities are not subject to the provisions of this article:

- (1) Disposal of only uncontaminated rocks, bricks, concrete, road demolition waste materials, or dirt.
- (2) Land application activities regulated under rules of the water pollution control ~~board~~ **division** at [327 IAC 6.1](#) and [327 IAC 7.1](#).
- (3) Confined feeding control activities regulated under rules of the water pollution control ~~board~~ **division** at [327 IAC 16](#).
- (4) Wastewater discharge activities regulated under rules of the water pollution control ~~board~~ **division** at [327 IAC 5](#).
- (5) Solid waste management activities regulated under [329 IAC 11](#).
- (6) Disposal of uncontaminated and untreated natural growth solid waste, including tree limbs, stumps, leaves, and grass clippings.
- (7) Disposal of saw dust derived from processing untreated natural wood.
- (8) **Except for coal combustion residuals impoundments subject to 40 CFR 257, Subpart D**, disposal of coal ash, transported by water, into an ash pond which has received a water pollution control facility construction permit under rules of the water pollution control ~~board~~ **division** at [327 IAC 3](#).
- (9) **Except for coal combustion residuals impoundments subject to 40 CFR 257, Subpart D**, the operation of surface impoundments; however, the final disposal of solid waste in such facilities **surface impoundments** at the end of their operation is subject to approval by the commissioner except as excluded under subdivisions (8) and (10). The commissioner's approval is based on management practices that are protective of human health and the environment.
- (10) Disposal of coal ash at a site receiving a total of less than one hundred (100) cubic yards per year from generators who each produce less than one hundred (100) cubic yards per year.
- (11) The uses and disposal of coal waste as exempted under [IC 13-19-3-3](#).
- (12) Activities concerning wastes containing polychlorinated biphenyls (PCBs) regulated under [329 IAC 4.1](#), except those regulated as alternative daily cover under [329 IAC 10-20-14.1](#).
- (13) Storage, transportation, and processing of used oil as regulated under [329 IAC 13](#).
- (14) The legitimate use of slag under [IC 13-19-3-8](#).
- (15) The legitimate use of foundry sand under [IC 13-19-3-7](#).
- (16) Any other use of solid waste approved by the commissioner based on the commissioner's determination that the use is a legitimate use that does not pose a threat to public health or the environment.

(Solid Waste Management Division; [329 IAC 10-3-1](#); filed Mar 14, 1996, 5:00 p.m.: 19 IR 1795; filed Mar 19, 1998, 11:07 a.m.: 21 IR 2749; filed Aug 2, 1999, 11:50 a.m.: 22 IR 3771; readopted filed Jan 10, 2001, 3:25 p.m.: 24 IR 1535; filed Feb 9, 2004, 4:51 p.m.: 27 IR 1797, eff Apr 1, 2004)

SECTION 2. [329 IAC 10-9-1](#) IS AMENDED TO READ AS FOLLOWS:

[329 IAC 10-9-1](#) Types of facilities

Authority: [IC 13-14-8-7](#); [IC 13-15-2-1](#); [IC 13-19-3-1](#)

Affected: [IC 13-30-2](#); [IC 36-9-30](#)

Sec. 1. (a) The following categories will be used for the purpose of defining site requirements and permissible wastes to be received for all solid waste land disposal facilities:

- (1) Municipal solid waste landfill (MSWLF).
- (2) Construction/demolition site.
- (3) Restricted waste site as follows:
 - (A) Restricted waste site Type I.
 - (B) Restricted waste site Type II.
 - (C) Restricted waste site Type III.

- (D) Restricted waste site Type IV.
- (4) Nonmunicipal solid waste landfill.

(b) The owner and operator of a coal combustion residuals impoundment subject to 40 CFR 257, Subpart D, shall comply with the requirements for surface impoundments in accordance with 40 CFR 257.50* through 40 CFR 257.106*.

(c) For a coal combustion residuals impoundment subject to 40 CFR 257, Subpart D, final disposal of solid waste in the impoundment at the end of the operation of the impoundment is subject to approval by the commissioner, based on the requirements for coal combustion residuals impoundments in 40 CFR 257.50* through 40 CFR 257.106* and on other management practices that are protective of human health and the environment.

***These documents are incorporated by reference. Copies may be viewed online from the Government Publishing Office at www.gpo.gov, or are available for review and copying at the Indiana Department of Environmental Management, Office of Legal Counsel, Indiana Government Center North, Thirteenth Floor, 100 North Senate Avenue, Indianapolis, Indiana 46204.**

(Solid Waste Management Division; [329 IAC 10-9-1](#); filed Mar 14, 1996, 5:00 p.m.: 19 IR 1805; filed Aug 2, 1999, 11:50 a.m.: 22 IR 3787; readopted filed Jan 10, 2001, 3:25 p.m.: 24 IR 1535; readopted filed May 14, 2007, 1:53 p.m.: [20070523-IR-329070138BFA](#); readopted filed Jul 29, 2013, 9:20 a.m.: [20130828-IR-329130179BFA](#))

[Notice of Public Hearing](#)

Posted: 06/01/2016 by Legislative Services Agency
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